Filed 11/14/16 In re J.C. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re J.C., a Person Coming Under the Juvenile Court Law.	H043004 (Santa Clara County Super. Ct. No. 3-15-JV41070 A & B)
THE PEOPLE, Plaintiff and Respondent, v. J.C., Defendant and Appellant.	

J.C. was adjudged a ward of the juvenile court and placed on probation following the court's sustaining allegations that she committed second-degree robbery and assault with force likely to produce great bodily injury.

On appeal, J.C. argues that the court erred because it did not make a factual finding pursuant to Penal Code section 654[1] as to whether the force used to commit the assault was the same course of conduct as that which was used to commit the second-degree robbery.

[1] All further unspecified statutory references are to the Penal Code.

STATEMENT OF THE CASE

On February 4, 2015, the first of two warship petitions (Welf. & Inst. Code, § 602), was filed against J.C. The petition ["A Petition"] alleged that J.C., age 17, committed two counts of attempted second-degree robbery (Pen. Code, §§ 664/211-212.5, subd. (c)), misdemeanor battery (§§ 242-243, subd. (a)), and misdemeanor possession of alcohol by a minor (Bus. & Prof. Code, § 25662, subd. (a)). At the time, J.C. was a dependent of the juvenile court. On March 24, 2015, the juvenile court found that it was in J.C.'s best interest to remain a dependent of the court and referred her to probation for informal supervision.

The second petition ["B Petition"] was filed on July 16, 2015 and alleged that J.C., age 17, committed second-degree robbery (§§ 211-212.5, subd. (c)) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). On October 13, 2015, following a contested jurisdictional hearing, the juvenile court filed a written order finding that both counts had been proven beyond a reasonable doubt.

On October 14, 2015, with regard to the A Petition, J.C. admitted that she committed one count of attempted second-degree robbery, misdemeanor battery, and misdemeanor possession of alcohol by a minor. The second count of attempted second-degree robbery was dismissed.

On November 4, 2015, the J.C. was adjudged a ward of the court and placed her on probation in her group home. J.C. timely appealed.

STATEMENT OF THE FACTS[2]

On July 14, 2015, J.C. walked past the only cashier at a grocery store and as she was doing so, the cashier saw a toothbrush in its packaging fall from J.C.'s jacket. The cashier called out to J.C. to stop, but J.C. did not. The cashier called the store manager and the store security guard to report that J.C. was a shoplifter.

[2] The facts supporting the A Petition are omitted because they are not relevant to the issue on appeal.

The security guard responded to the cashier's call. He walked to the front of the store, and saw the cashier pointing at J.C. J.C. walked past registers and walked toward the front door of the store. The security guard tapped J.C. on her back, and identified himself as the security guard, but J.C. continued walking and left the store. The security guard stood in front of J.C., and asked her what she took from the store. J.C. pulled out cheese and crackers from her pocket, and said she did not steal anything. The security guard told J.C. that she needed to go back into the store to pay for the items that she took. J.C. refused to return to the store, tossed the items at the security guard, and pushed him aside.

The security guard then grabbed J.C.'s arm, and tried to take her back to the store. J.C. pushed the security guard and he fell to the ground. As he was falling, the security guard grabbed Julia's backpack, and she also fell to the ground. The security guard told Julia that she was under citizen's arrest, and her jacket opened up revealing more stolen items.

During their struggle, J.C. tried to bite the security guard's wrist, and he let one of her hands go. J.C. then grabbed and squeezed the security guard's groin area. The security guard then grabbed J.C.'s wrist, and continued to detain her until the police arrived.

Both the store manager and the cashier saw the altercation between J.C. and the security guard. They saw the security guard on top of J.C. while they were both on the ground and saw J.C. kicking and flailing. J.C. began yelling that the security guard was trying to rape her.

When the police arrived, an officer searched J.C.'s backpack and found toothpaste, chocolates, cheese, and Mickey's, Corona Extra, and Modelo Especial beers.

J.C. testified that on the night of the incident, prior to going to the grocery store, she put some clothes and a couple of beers into her backpack. J.C. admitted going inside the store and taking chocolates, cheese, toothpaste and a toothbrush, and that she had no

intention of paying for these items. While walking out of the store, J.C. dropped the toothbrush.

When J.C. was outside, a security guard tapped her shoulder, and said come back into the store. J.C. said that she would give him the items, but would not go back into the store. J.C. dropped the items that she had stolen, but the security guard insisted that she return to the store. When J.C. attempted to leave, the security guard pushed her, and said that she assaulted him. J.C. tried to leave again and the security guard tackled her.

J.C. struggled with the security guard to get him off of her, because he was attacking her. Two minutes into the altercation, J.C. felt her pants coming down. Because her pants had come down, and the security guard was on top of her, she thought that he might sexually assault her.

J.C. panicked when she thought that she was being sexually assaulted. She began flailing her legs, but did not intentionally kick, hit or grab the security guard's private parts. J.C.'s intention was to get the security guard off of her, and prevent him from sexually assaulting her.

DISCUSSION

J.C. argues that the trial court erred in not making a factual finding pursuant to section 654 regarding whether the force used in the assault was same course of conduct as that which was used to commit the second-degree robbery.

During the proceedings below, the juvenile court determined that it did not need to make a finding pursuant to section 654, because based on the circumstances of the case, it was not required to state a maximum period of confinement. As such, a section 654 finding was irrelevant and unnecessary.

Welfare and Institutions Code section 726, subdivision (d) provides: "(1) If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to [Welf. & Inst. Code] Section 602, the order shall specify that the minor may not be held in physical confinement for a period in

excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. [¶] . . . [¶] (5) 'Physical confinement' means placement in a juvenile hall, ranch, camp, forestry camp or secure juvenile home pursuant to [Welf. & Inst. Code] Section 730, or in any institution operated by the Department of Corrections and Rehabilitation, Division of Juvenile Justice."

California Rules of Court, rule 5.795(b) provides: "If the youth is declared a ward under [Welf. & Inst. Code] section 602 and ordered removed from the physical custody of a parent or guardian, the court must specify and note in the minutes the maximum period of confinement under [Welf. & Inst. Code] section 726."

Here, J.C. was both a dependent and a ward of the juvenile court, and had been removed from her mother's home in June 2013, prior to the petitions being filed in this case. Since that time, J.C. has lived in various group homes, and her mother has refused to have contact with her.

At the dispositional hearing on the B Petition on November 4, 2015, the court ordered probation and placement in the same group home where J.C. already lived. As such, J.C. remained a dependent and ward of the juvenile court, and was not removed from the physical custody of her parent or guardian as a result of the wardship petition. In addition, the court did not order J.C. to be physically confined.

"When a juvenile ward is allowed to remain in his parents' custody, there is no physical confinement and therefore no need to set a maximum term of confinement." (*In re Ali A.* (2006) 139 Cal.App.4th 569, 571 (*Ali A.*).) The court in *Ali A.* stated further that the requirement of Welfare and Institutions Code section 726, subdivision (d)(1) applies only if the minor is removed from the physical custody of his or her parent or guardian. (*Id*. at p. 573.) Because the minor was released to his parents on probation, the juvenile court was not required to include a maximum term of confinement in its dispositional order. (*Ibid*.) A maximum term of confinement in such circumstances would have "no

legal effect." (*Id*. at p. 574.) In the event that the minor violated the terms of his probation, a further hearing would have to be held before the juvenile court could determine whether to remove the minor from his home. (*Id*. at pp. 573-574.) If the juvenile court determined it would remove the minor from his home, it then would be required to declare a maximum time of confinement. (*Id*. at p. 574.)

J.C. agrees that the "juvenile court was not required to make a calculation of [her] maximum confinement time, unless she was committed to DJJ or removed from the home." She argues, however, that although there was not physical confinement ordered in this case, the juvenile court should have made a section 654 finding because it "was best suited to make this factual determination, because it heard the jurisdictional hearing."

While it is true that a section 654 finding is factual and should be made in the trial court, such a finding was irrelevant and not necessary given the fact that J.C. was not ordered physically confined. J.C. cites no legal authority for the proposition that a juvenile court is required to make a section 654 finding when it does not remove the minor from the custody of her parent or guardian as the result of a wardship petition, and does not order physical confinement for the minor.

Because the court did not order J.C. to be physically confined, it properly did not specify a maximum period of confinement. As such, a section 654 finding was not necessary, because there was no punishment that could be stayed as a result of the finding. The juvenile court did not err in this case.

DISPOSITION

The order is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

_____
ELIA, J.

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